EXECUTIVE CHAMBERS
HONOLULU
July 13, 2004

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 459

Honorable Members
Twenty-Second Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, Senate Bill No. 459, entitled "A Bill for an Act Relating to Campaign Spending."

The purpose of this bill is to restore the public's confidence in the integrity of the election process by reducing the influence of reliance on campaign contributions.

This bill is objectionable for several reasons, including very serious technical errors in the bill that leave provisions of the bill vulnerable to serious and substantial constitutional challenges, which would lead to the virtually certain prospect of lawsuits, and leave the State open to adverse court judgments on the constitutionality of the bill and to large attorneys' fee awards against the State. Tied up with these very serious technical errors are provisions that would lead to confusion, uncertainty, and serious questions about who is actually subject to many of the bill's provisions. It is crucial that a bill regulating campaign contributions be clear in its application, well thought out, and fair. The serious flaws in this bill make it abundantly clear that the bill is not clear in its application, not well thought out, and not fair.

In the order that they appear, the errors and concerns include:

1. In section 11-204(m)(3), Hawaii Revised Statutes, as amended at page 18, lines 12-15, the likely typographical omission of a "not" completely changes the apparent intent of the legislature. Subsection (m)(3) provides that the prohibition against contributions applies to "[a] noncandidate committee that <u>has</u> received contributions of $10 or more from ten or more

individuals registered to vote in this State during the one hundred and eighty days prior to an election, provided that this subsection does not apply to loans made in the ordinary course of business." (emphasis added). The intent of this provision was to bar contributions from a noncandidate committee that had not received at least ten contributions from Hawaii residents. The removal of the word "not" is a clear drafting error that would essentially bar contributions from almost all noncandidate committees whose donors are Hawaii residents.

2. Section 8 replaces what is a monitoring-by-registration process for regulating campaign contributions from entities that contract with State and county agencies, with a twenty-four-month ban on contributions from some but not all entities that contract with the State or counties, to candidates for some, but not all offices. This change is seriously flawed in several respects.

a. Despite several references, including a clear statement in section 1 of the bill, and in the Conference Committee Report, that the bill is intended to prohibit contributions by government contactors "selected by a nonbid process" who seek or hold contracts in excess of $25,000, every reference to the Procurement Code for purposes of describing who is exempt from the restriction on contributions (i.e., who can contribute) is to section 103D-303, Hawaii Revised Statutes, the section for awarding contracts by competitive sealed proposals, rather than section 103D-302, Hawaii Revised Statutes, the section for awarding contracts by competitive sealed bidding. Thus, contractors awarded government contracts under the most objective basis--low prices (competitive sealed bidding)--are actually prohibited from making contributions, while contractors who receive contracts under substantially a more subjective procurement method, i.e., pre-established qualitative evaluation criteria which may or may not include price (competitive sealed

proposals), may make contributions. If the legislature actually intended the bill to read as it does, it would be very difficult, if not impossible, to constitutionally defend the line the legislature has drawn against an equal protection and/or due process challenge, because it makes no sense to exclude from contributing those who bid via sealed bidding while allowing contributions from those who bid via sealed bidding proposals. And, if that actually was the intent of the legislature, it is appropriate to veto the bill on policy grounds alone. If the reference to section 103D-303 is simply an error, then the problem--of constitutional dimensions--needs to be fixed before the law can be allowed to go into effect, and vetoing the bill is the only way to accomplish that.

b. It appears to be the intent of the section to have the time limit run commencing with certain procurement activities that the particular government contractor at issue participates in by submitting a bid. However, the section does not state this, and terms critical to determining when the twenty-four-month ban on contributions begins to run are vaguely described or not defined at all. For example, "procurement activity" is not even defined. At page 20, lines 20-22, and page 21, lines 1-8, the amendment to section 11-205.5, Hawaii Revised Statutes, defines the period of time during which contributions are unlawful as "commencing with any procurement activity conducted by a purchasing agency" and ending "Twenty four [sic] months after the termination of the procurement activity" or "after completion of the government contract if the procurement activity results in acceptance." In most instances, the public is wholly unaware of preliminary procurement activities, including, for example, deciding whether to issue a request for information or proceeding directly to developing specifications for a bid. It would have been far better if a more publicly discernible starting point (like the posting of an invitation for

sealed proposals, or the creation of a selection committee for professional services) had been selected. "Notice of appropriation," the alternative clock-starter for the twenty-four-month contribution ban period, is also not defined. Nor is there a mechanism for determining which of the two clock-starters control. The contribution ban period should be tied to a procurement activity involving the government contractor at issue and is unnecessarily and inappropriately vague. This lack of notice risks very substantial constitutional challenges based upon due process. It is crucial that a law that bans activities like making political contributions be very clear in its application, so that those who may be subject to it are not forced to simply guess at what the law means.

c. Again, there appear to be several typographical errors that cloud the process and the meaning of the bill: at page 21, line 4, because "and" rather than "or" is used, both successful and unsuccessful bidders appear to be precluded from making contributions for the twenty-four-month contribution ban period; (at page 21, line 17, "though" should have been "through," and "disbarred" should have been "debarred.)"

d. The bases for distinctions that the ban relies upon are not readily discernible. At page 21, lines 11-17, there is a provision that makes it unlawful for "any business against which debarment or suspension proceedings are commenced" to make a contribution through the period of debarment or suspension. Commencement of proceedings can, in some circumstances, occur without notice and an opportunity to be heard. Barring contributions based on an accusation without a hearing or finding of guilt or probable cause or reasonable grounds could in some circumstances deny a would-be contributor due process of law. At page 22, lines 1-7, an exception is made such that individuals employed by a government contractor can contribute so long as the

contribution comes from the individual's personal funds. However, while an "officer or director" of the contractor cannot contribute, a major stockholder in the business who is not an officer or director, or a general partner in a partnership can contribute. This is an irrational distinction and creates a very large loophole. There must be a fair and level playing field, and if contributions by an officer and director are to be limited, so to must contributions by major stockholders or general partners, etc.

e. The prohibition against government contractor contribution is extremely vague in its application to contributions to candidates for State and county legislative offices (and even offices like Governor and Mayor in certain circumstances), and appears not to apply to entities with contracts with agencies headed by non-elected officials even though the contracts are funded by "appropriations." The language used at page 22, lines 10-20, provides very little notice in many circumstances of whether particular contributions are banned or not. Again, it is crucial that those who are to be subject to a ban not be forced to guess at its application.

f. It is unclear if, when, or how the ban is to be effected when a "notice of appropriation" starts the clock for the twenty-four-month ban, or the "procurement activity" involves the acquisition of real property, see definitions of "government contract" at page 24, line 4, and "purchasing agency" at page 25, line 6.

3. The section concerning "coordinated activity," section 11-207, Hawaii Revised Statutes, as amended at page 27, lines 14-17, page 28, lines 21-22, and page 29, lines 1-5, that is, when an expenditure by a person will be considered a contribution to a candidate and subject to regulation, raises serious constitutional issues based on vagueness and overbreadth.

"Coordinated activity," for example, means an expenditure "by a person . . . who is actively engaged in coordination with that candidate" on any campaign activity. What does "actively engaged" mean? The bill does not define the term. The only way to be sure that one is not participating in a coordinated activity is by not interacting with a candidate or a candidate's committee or agent at all. Another example of a "coordinated activity" provides at page 28, lines 15-22: "A payment is made by a person if in the same election period the person making the payment . . . (B) Has previously participated in discussions with the candidate, an agent of the candidate's authorized committee, or a committee of a political party which is coordinating with the candidate regarding the candidate's campaign strategy." Under this provision, it would appear that "any discussion," even marginally related to the campaign, would subject a campaign expenditure to regulation as a contribution. Thus, if a person discussed with a candidate, at a rally, any issue related to the campaign, an independent expenditure by that person is considered to be both a contribution to the candidate and an expenditure by the candidate." This section is both vague and overbroad.

Perhaps the sharpest example of overbreadth appears in subsection (b)(2) at page 28, lines 7-14. A "coordinated activity" (which means that the expenditure is counted as both a contribution to a candidate and an expenditure by a candidate) includes "a payment . . . for the production, dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign material prepared by a candidate, a candidate's authorized committee, or an agent of a candidate or authorized committee or a communication that expressly advocates for or against a candidate." (emphasis added). The highlighted portion of the provision literally subjects "express advocacy" to limitations

that United States Supreme Court precedent unequivocally holds is violative of the First Amendment. Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604, 610, 116 S. Ct. 2309, 2313 (1996) ("Colorado I") and 533 U.S. 431, 121 S. Ct. 2351 (2001) ("Colorado II"), and more recently McConnell v. Federal Election Commission, 124 S. Ct. 619, 705-06 (2003), say clearly that it is unconstitutional to limit expressions in the form of expenditures that support the election of a candidate or issue that are made independently and separately from any input from a candidate, or person or entity associated with a candidate. Enforcement of the provision is likely to be enjoined as unconstitutionally violative of the First Amendment's prohibition against placing a limit on independent expenditures. In addition, in a circumstance in which there are more than two candidates, and a person advocates against one of the candidates, to which of the other candidates is the "contribution" attributed?

For the foregoing reasons, I am returning Senate Bill No. 459 without my approval.

Respectfully,

LINDA LINGLE
Governor of Hawaii